No. 49867-7-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

IN RE ESTATE OF ELMA KANGAS;

DALE KANGAS, *deceased*,

Appellant,

v.

RICHARD KANGAS, Personal Representative of
the Estate of Elma Kangas,

Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

Richard Kangas and John Kangas were brothers. When their mother Elma Kangas died, Richard became her personal representative (PR). When their father Wayne Kangas died a few years later, Richard's estranged wife became his PR. Perhaps predictably, a great deal of in-fighting ensued.

In any event, all the other heirs settled under TEDRA in 2008, and Richard and John settled under TEDRA in 2009. John released all claims against Richard, including any alleged breach of fiduciary duty claims. Distributions were made in reliance upon the settlements and releases.

John died and his son, appellant Dale Kangas, became his PR. Even though John's settlement with Richard reserved a PR fee for Richard, Dale contested it. Two experts opined that Richard's PR fees were more than reasonable. No expert contradicted them.

The trial court acted well within its broad discretion. This appeal is frivolous. This Court should affirm and award Richard fees and costs on appeal.

RESTATEMENT OF ISSUES

1. Are two settlement agreements releasing all claims against a PR and signed by all relevant parties binding on the signatories?

2. Where a party settles and releases all claims – including breach of fiduciary duty – and accepts the benefits of the settlement, may his PR renege on the deal many years later?

3. Is there sufficient evidence in the record to support the trial court's award of $60,000 PR fees, where a professional forester affirmed the fairness of the PR fee for harvest management, and where a professional bank PR said that the bank's PR fee for doing the same work would have been over $150,000, and where no expert contradicted either of these experts' declarations?

STATEMENT OF THE CASE

This appeal is largely factual, and as discussed *infra*, is largely barred by prior settlements. The procedural history relevant to these settlements is outlined here. The facts relevant to Dale's specific arguments are discussed in the argument.

A. Both Elma and Wayne Kangas died testate in the mid-1990s.

Elma Kangas, a resident of Lewis County, Washington, died testate on December 6, 1994, in Olympia, Washington. CP 1. She left three heirs: her husband Wayne Kangas, and their sons John Kangas and Richard Kangas. *Id.* Husband Wayne[1] and son John were both nominated PR of Elma's Estate. CP 188-89. Both declined and nominated son Richard. CP 191-92. Richard was appointed PR on March 31, 1995. CP 4.

On January 6, 1998, Wayne also died testate in Lewis County and his will was admitted to probate on February 13, 1998. CP 5. Wayne's will disinherited his sons (John and Richard) in favor of his daughter-in-law, Donna L. Kangas (Richard's estranged wife) and of his grandchild, Tammi L. Kangas-Van de Laarschot (Richard and Donna's daughter). CP 50. Tammi was appointed PR. CP 5.

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[1] First names are used solely for convenience; intending no disrespect.

B. Disputes arose among Elma's and Wayne's heirs.

All heirs in both estates (Richard, John, Tammi, and Donna) appeared through counsel in Elma's Estate. CP 195-201. A dispute arose between Richard and Tammi, individually and as PRs of Elma's and Wayne's Estates; among other items, they disputed the specific assets to be used to fund the marital deduction and credit shelter trust in Elma's Estate. CP 5. The interests of the heirs and PRs of the respective Estates were of course substantially aligned with one another: Tammi's, Donna's, and Wayne's Estate's positions were consistent with one another, and adverse to Richard's, John's, and Elma's Estate's, and vice versa. *Id.*

C. Elma's and Wayne's heirs settled their disputes under TEDRA.

The heirs eventually arbitrated under TEDRA. On the fourth day (October 2, 2008) they reached a Settlement Agreement. CP 51-52. This Agreement resolved or provided for the claims and interests of those taking by and through Wayne (*i.e.*, Wayne's Estate, Tammi, Donna, and WTD Kangas, LLC). CP 25. Only John and Richard remained parties/heirs in Elma's Estate. CP 4-17. But John released and discharged Richard "for any claim of breach of fiduciary duty regarding any known acts," and consented "to the reasonableness of the settlement terms herein...." CP 198.

And on February 25, 2009, John and Richard resolved their disputes through an Order and Nonjudicial Dispute Resolution Agreement on Estate Administration and Distribution under RCW 11.96A.220, *et seq.* ("ONDRA"). CP 4-17. John waived an accounting, and consented to and approved "all acts of Richard as personal representative . . . and as trustee of the trust under Elma's Will, to [February 25, 2009]." CP 8. Judge James W. Lawler signed the ONDRA. CP 13. The heirs and John received distributions from Elma's Estate in reliance upon these settlements. CP 8.

D. John died, and Richard sought to close Elma's Estate, but John's PR (Dale) objected to Richard's PR fees.

John died, and his son Dale Kangas (appellant here) was appointed as his PR. CP 143, 146. On September 2, 2016, Richard filed a Petition to close Elma's Estate. CP 49-91. Dale objected to Richard's PR fee of $60,000. CP 143-50.

On October 25, 2016, the court entered an Order Granting Reasonable Personal Representative Fees to Richard. CP 179-81. The amount awarded, $60,000, along with other matters, were the subjects of a further hearing and Court Order. CP 182-84. These two probate orders are the subject of this appeal. CP 177-84.

ARGUMENT

A. John is dead: this appeal should be dismissed.

The real party in interest – John Kangas – is dead. BA 9. No one has moved to substitute his Estate (or anyone else) here. The deceased's son and lawyer have no standing to pursue these claims. The Court should dismiss this appeal.

B. Dale's primary argument is unpreserved.

Dale's primary argument is based on allegations that Richard breached a fiduciary duty to John. BA 8-13. The trial court struck all evidence and argument based on those alleged breaches of fiduciary duty because Richard and John settled them (CP 180):

> Petitioner's Motion to Strike Portion of Dale Kangas' Objection to Petition is GRANTED, thereby excluding all testimony of any breach of duty and/or delay in resolving estate disputes and ownership through February 24, 2009, based upon John M. Kangas' consent and approval of all acts of Petitioner, as Personal Representative and Trustee, from December 6, 1994, the date of the Decedent's death, through the signature date of the Order and Nonjudicial Dispute Resolution Agreement on Estate Administration and Distribution Under RCW 11.96A.222, *et. seq.* (page 5, lines 10-13) and his "release and discharge of any and all claims, loss, liability, accounting or damage" against Petitioner (Id. Page 7, lines 2-8);

Dale has neither assigned error to this order, nor argued that it was in error. BA 2. The ruling is the law of the case. *See, e.g.,* ***Vigil***

v. Spokane Cnty., 42 Wn. App. 796, 799, 714 P.2d 692 (1986) (unchallenged ruling is law of the case); ***State v. Sponburgh***, 84 Wn.2d 203, 208, 525 P.2d 238 (1974) (unappealed ruling is law of the case). As a result, no record supports Dale's first argument. It is thus unpreserved and frivolous.

And the Settlement Agreement and the ONDRA in fact bar all such claims, so the trial court's ruling would still be correct even if Dale had properly preserved the issue.[2] For instance, in the ONDRA John waived an accounting, and consented to and approved "all acts of Richard as personal representative . . . and as trustee of the trust under Elma's Will, to [February 25, 2009]." CP 8. John acknowledged that his representations/release/waivers in the ONDRA were "***binding as a final order upon filing*** in accordance with RCW 11.96A.230" (CP 10) and "binding upon . . . [his] ***heirs*** . . . [and] ***legal representatives***." CP 11 (emphases added). No one appealed that final order.

This issue is barred, unpreserved, and frivolous.

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[2] *See generally, e.g.*, ***Plancich v. Progressive Am. Ins. Co.***, 134 Wn. App. 543, 546, 142 P.3d 173 (2006) (citing ***Mut. of Enumclaw Ins. Co. v. State Farm Mut. Auto. Ins. Co.***, 37 Wn. App. 690, 694, 682 P.2d 317 (1984); *accord* ***Or. Mut. Ins. Co. v. Barton***, 109 Wn. App. 405, 414, 36 P.3d 1065 (2001) ("The court presumes that a general settlement agreement embraces all existing claims arising from the underlying incident.")).

C. No apposite – much less binding – precedent supports Dale's primary argument.

Dale's first argument is also based on cases and laws from various other places not briefed in the trial court. BA 9-11 (citing an Arizona statute, an ERISA case, a New York District Court decision, and a New York appellate decision). None of that law applies here.[3]

Dale cites ***Estate of Hitchcock***, 140 Wn. App. 526, 167 P.3d 1180 (2007) concerning accountings. An accounting is not at issue in this appeal. ***Hitchcock*** is irrelevant.

Dale cites ***Langley v. Devlin***, 95 Wash. 171, 163 P. 395 (1917). ***Langley*** involved an alleged fraud perpetrated by some partners against other partners in the sale of a coal mine. It has nothing to do with this case. It is also questionable law, as it arose prior to ***Thorndike v. Heperian Orchards***, 54 Wn.2d 570, 343 P.2d 183 (1959) – a time when the Supreme Court could find facts.

Dale cites ***Hesthagen v. Harby***, 78 Wn.2d 934, 481 P.2d 438 (1971). It holds that an innocent failure to notify heirs (children of a deceased brother) created a constructive trust in their favor and that an administrator's failure to actively determine whether those heirs

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[3] Dale later cites a decision from another time and place, ***Stewart v. Wright***, 147 F. 321 (8th Cir. 1906). It has nothing to do with this case.

existed was a breach of fiduciary duty not subject to the shorter three-year statute of limitations. Neither a failure to notify nor the statute of limitations is at issue here. ***Hesthagen*** is inapposite.

In sum, Dale cites no apposite, much less binding, authority for his primary argument. He also has no facts, which remain stricken. His argument is frivolous and should be rejected.

D. Ample evidence supports the PR fees – no abuse of discretion occurred.

Dale argues that the trial court abused its discretion in awarding Richard a $60,000 PR fee because it took several years to close the Estate, because Richard allegedly "slow walk[ed]" timber sales, and because Richard failed to "justify" his PR fee. BA 13-21. The trial court did not abuse its discretion – to put it mildly.

1. Any delay was reasonable and justified.

The trial court did not abuse its discretion in concluding that any alleged "delay" in settling Elma's Estate after Richard and John settled in 2009 was reasonable and justified. For example, part of the Estate included a marital community interest in 115.12 acres of land and timber. CP 196-97. The 2008 Settlement Agreement partitioned the co-mingled interests of many parties who acquired interests by and through Wayne after Elma's death. CP 195-201. Elma's Estate

received cash, clear title to merchantable timber on 115.12 acres of land, and certain real property. CP 197-98.

In the 2008 Settlement Agreement – which occurred during the worst of the "Great Recession" – John specifically authorized a long harvest period, up to and including October 2, 2015. CP 197. This was a settlement of "all claims between the respective Estates and the individuals in their capacities as heirs of the Estates." CP 196. John also released and discharged Richard "for any claim of breach of fiduciary duty regarding any known acts," and consented "to the reasonableness of the settlement terms herein...." CP 198.

Approximately five months later, John and Richard agreed to the February 25, 2009 ONDRA that Judge Lawler signed. CP 4-17. The ONDRA recites the probate's complex procedural history, noting John's and Richard's agreement on all known disputes to that date. *Id.* John waived an accounting, and consented to and approved "all acts of Richard as personal representative . . . and as trustee of the trust under Elma's Will, to [February 25, 2009]." CP 8.

The ONDRA expressly reserved a fee for Richard's PR services. CP 7. It also listed the services Richard performed as PR, including but not limited to:

> making arrangements with the funeral home and cemetery;
>
> retaining legal counsel to probate the Decedent's Will;
>
> engaging a certified public accountant to prepare the Decedent's federal estate tax return (IRS Form 706) and state of Washington estate tax return,
>
> identifying and valuing the Decedent's assets;
>
> hiring a real estate appraiser and timber cruiser;
>
> managing the Decedent's property and two timber sales;
>
> paying creditor's claims and costs of administration;
>
> arranging for preparation and filing of the Decedent's final income tax return and the Estate's income tax return;
>
> and making distributions as indicated.

CP 7 (paragraphing added). John acknowledged his representations and agreements in the ONDRA were "***binding as a final order upon filing*** in accordance with RCW 11.96A.230" (CP 10) and "binding upon . . . [his] ***heirs*** . . . [and] ***legal representatives***." CP 11 (emphases added). No one appealed that final order.

The Estate's merchantable timber was harvested in 2013. CP 93. That was two years before the Settlement Agreement deadline of October 2015. CP 205. According to a logger with 41 years' experience, "Richard sold the timber at the optimal time." CP 93. The timber "was at least twice the value" it had been at or near the time

of the 2008 Settlement Agreement.[4] *Id.* The gross proceeds, net of logging costs, totaled $492,717. CP 53.

In sum, the trial court did not abuse its discretion in finding that Richard was "entitled to a reasonable fee for his Personal Representative and Forestry Consultant services undiminished or reduced by any claims that the Personal Representative failed to discharge his duties." CP 180.[5] The Court should reject Dale's arguments and unsupported factual allegations to the contrary, which the trial court correctly rejected.

2. Richard provided professional and timely forestry management services – according to a forester.

In yet another red herring, Dale argues that the $30,000 Richard requested for managing the timber harvest is not reasonable or is unsupported. BA 17-18. This is simply false.

On behalf of Elma's Estate, Richard entered a Logging Contract with North Fork Timber Company. CP 68-91. Instead of hiring a forester, however, Richard accepted responsibility for contract administration. CP 93. In addition to negotiating the Logging Contract, Richard's tasks included (CP 52):

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[4] The timber was worth about $241,000.00 on October 2, 2008. CP 52.

[5] As noted, this ruling was based on John's settlement releases, but it is also supported by the post-settlement facts cited *supra* and *infra*.

selecting the logger [CP 93];

posting [a] performance bond [CP 59];

marketing the logs [CP 60];

applying for permits (Forest Practice Application) [CP 28];

[ensuring] state (harvest) tax compliance [CP 70];

providing daily/weekly oversight of logger [CP 53];

[dealing with] road access [CP 60-61];

accounting for trip tickets/log payment proceeds [CP 69];

providing slash disposal [CP 62];

replanting (ordering trees and hiring/supervising tree planters) [CP 93-94];

[ensuring] income-tax compliance [CP 53]; and

handling the Department of Revenue audit [CP 144].

Gordon Pogorelc, owner of North Fork Timber Company – with 41 years' experience in the forest products industry (CP 92) – affirmed that Richard's services, "if performed by a forester, would cost at least $30,000 plus costs. Richard was competent to provide those services and conducted himself in a timely professional manner." CP 94. Pogorelc confirmed that Richard "spent at least forty hours in discussions/negotiations/management with me." CP 93. But as noted above, that is not all the work Richard performed. CP 52.

Dale's argument boils down to a he-said/he-said dispute that was for the trial court to resolve. The court had discretion to award PR fees. *See, e.g.*, RCW 11.48.210 (trial court may award PR "just and reasonable" fees for services); ***In re Estate of Douglas***, 65 Wn.2d 495, 504, 398 P.2d 7 (1965) (PR fee award will not be reversed absent abuse of discretion) (citation omitted). The facts were for the trial court to decide and it decided in Richard's favor. Dale's argument is baseless.

3. Substantial evidence supports the PR fees.

In his final argument, Dale again confirms that his whole point is that the trial court should have agreed with his spin. BA 19-21. But ample evidence supports the trial court's PR fee award. The argument is frivolous, and this Court should affirm.

Richard estimated that he spent over 4,000 hours of service as PR over 21 years. CP 54. Some of his PR services are itemized by date and task on 17 pages of the record, at CP 153-71. One list includes roughly 285 specific entries over a 21-year period for letters, phone calls, meetings, etc. CP 154-66. The other list is a handwritten summary of several dozen general activities that encompass hundreds or thousands of hours of work. CP 168-71.

Michael Alexander, Vice President and Trust Officer for Security State Bank, reviewed the Estate for purposes of estimating a conservative fee approach for these services if the Bank had acted as PR. CP 228-30. First, Alexander noted the size of the Estate, with marital community assets exceeding $1.6 million, $600,000 of which was to be placed in a credit shelter trust. CP 228. He also noted the four-day arbitration, Logging Contract administration, and the duration of the probate. CP 229. He concluded that "$151,750 would be a minimum amount charged as a reasonable and customary fee for Security State Bank Trust Department's services as a personal representative herein." *Id.*

Based on the above, the trial court awarded a very reasonable PR fee of $60,000 for Richard's 21 years of work, *including* the $30,000 for managing the timber harvest discussed above. CP 183. At 4,000 hours, Richard "made" $15 an hour. The trial court plainly did not abuse its discretion.

Dale argues that Richard – who is not a lawyer – nonetheless should have kept time like a lawyer. BA 17. No case or statute so requires. This argument is frivolous.

Dale argues that he calculates – based on supposition and innuendo – "77.45 hours" for the "292" entries. BA 20. No evidence

– and no expert opinion – supports his supposition. Richard amply supported his request. This appeal is frivolous.

E. This Court should award Richard fees on appeal.

This Court should award fees to Richard under RCW 11.96A.150(1). This statute grants trial and appellate courts great discretion in awarding attorney fees. ***In re the Estate of Fitzgerald***, 172 Wn. App. 437, 453, 294 P.3d 720 (2012); RCW 11.96A.150(1):

> (1) Either the superior court or any court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

This statute expressly allows this Court to consider any relevant factor when determining whether to make a fee award. ***In re Estate of Evans***, 181 Wn. App. 436, 451, 326 P.3d 755 (2014). It does not limit fee awards to only the prevailing party. *Id.*

One relevant factor should be the merits of Dale's appeal. As explained above, the trial court's PR fee award was fully justified by

the evidence, including two uncontradicted expert witnesses. John released Dale's other arguments long ago, and they are barred by a trial court ruling from which neither John nor Dale appealed, and which is indisputably the law of the case. In short, this appeal is frivolous.

RAP 18.9(a) provides that

> [t]he appellate court on its own initiative . . . may order a party or counsel . . . who uses these rules for the purpose of delay . . . to pay terms or compensatory damages to any other party who has been harmed by the delay . . .

In determining whether an appeal is brought for delay under this rule, the Court's "primary inquiry is whether, when considering the record as a whole, the appeal . . . presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." ***Streater v. White***, 26 Wn. App. 430, 434, 613 P.2d 187 (1980) (citing BLACK'S LAW DICTIONARY 796 (rev. 4th ed. 1968); ***Means v. Sears, Roebuck & Co.***, 550 S.W.2d 780 (Mo. 1977); ***United States v. Piper***, 227 F. Supp. 735 (N.D. Tex. 1964)).

The Court is "guided by the following considerations":

> (1) A civil appellant has a right to appeal under RAP 2.2;
>
> (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;

> (3) the record should be considered as a whole;
>
> (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
>
> (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Streater, 26 Wn. App. at 434-435 (citing Jordan, *Imposition of Terms and Compensatory Damages in Frivolous Appeals*, Wash. St. B. News, May 1980, at 46).

There is no doubt that this appeal cannot succeed. The record as a whole fully supports the trial court's sound exercise of discretion. It is simply frivolous to claim that after 21 years, two TEDRA settlements releasing all claims against the PR, and perhaps 4,000 hours of work (including three timber harvests that netted the Estate more than $650,000), the trial court *abused its discretion* in awarding this nominal amount of PR fees. CP 51-52. Reasonable minds cannot differ here. The appeal is frivolous.

Whether this Court awards the fees simply under RCW 11.96A.150(1), or also under RAP 18.9, a fee award is necessary to permit Richard to obtain the (frankly small and bitter) fruits of his labors. Wasting his PR fees on defending this appeal is unjust. Whatever Dale's motives – and they are certainly suspect on their

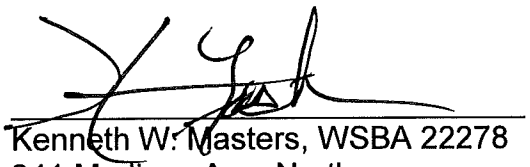
face – he has further delayed closing the Estate and the termination of this litigation with a frivolous appeal. This Court should grant Richard attorneys' fees and costs on appeal.

CONCLUSION

For the reasons stated, the Court should either dismiss the appeal for lack of standing, or affirm. Either way, the Court should award fees on appeal to be paid from Dale's portion of the Estate.

RESPECTFULLY SUBMITTED this 27th day of April, 2017.

MASTERS LAW GROUP, P.L.L.C.



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